

### **341.540 Reserve accounts of successive employing units.**

- (1) As used in this section, unless the context clearly requires otherwise:
  - (a) "Substantially common" or "substantially the same" means that one (1) or more individual or individuals own or exercise pervasive management or control over both the predecessor and successor employing unit. Factors indicating pervasive management or control include, but are not limited to, whether the predecessor and successor share:
    1. One (1) or more individuals or family members as owners, on boards of directors, as shareholders, or executive or other officers; and
    2. Titles to property, parent companies, workforce, assets, legal and professional representation, physical location, client pools, marketing services, Web sites, telephone numbers, or e-mail addresses;
  - (b) "Trade" or "business" includes the employing unit's workforce;
  - (c) "Knowingly" means having actual knowledge of, or acting with deliberate ignorance or disregard for, the prohibition involved; and
  - (d) "Violates" or "attempts to violate" includes, but is not limited to, intended evasion, misrepresentation, or willful nondisclosure.
- (2)
  - (a) For the purpose of this chapter, if a subject employer transfers all or part of its trade or business, the acquiring employing unit shall be deemed a successor if the transfer is in accordance with administrative regulations promulgated by the secretary, or if the transferring and acquiring employing units have substantially the same pervasive management, ownership, or control. If an employing unit is deemed a successor, the transferring employing unit shall be deemed a predecessor.
  - (b) For the purpose of this chapter, if a nonsubject employer acquires all or part of the trade or business of a subject employer, the nonsubject employer shall file an application with the Office of Employment and Training, Department of Workforce Investment to establish an unemployment reserve account within forty-five (45) days of employing personnel. The application will be considered and processed in accordance with administrative regulations promulgated by the secretary and shall require information necessary to determine whether the nonsubject employer is a successor of the subject employer and to establish an initial unemployment contribution rate for the employer. Factors to be considered in the determination of successorship and the fixing of the initial rate shall include but not be limited to the employer's prior unemployment claims history, benefit charges, historical rate charges, and payment penalties assessed in the previous five (5) years, in addition to the factors set forth in subsection (6)(b) of this section. After consideration of these factors, and others that the applicant may submit in justification of an initial rate determination, the secretary shall set an appropriate contribution rate. Any determinations of initial unemployment contribution rates made pursuant to this subsection shall not be effective prior to January 1, 2018.

- (3)
  - (a) Notwithstanding subsection (2)(b) of this section, any successor to the trade or business of a subject employer shall assume the resources and liabilities of the predecessor's reserve account, including interest, and shall continue the payment of all contributions and interest due under this chapter, except that the successor shall not be required to assume the liability of any delinquent contributions and interest of a predecessor or predecessors unless the cabinet notifies the successor of the delinquency within six (6) months after the department has notice of the succession; and
  - (b) Any nonsubject employer that is deemed a successor in whole or part upon submission of the application referred to in subsection (2)(b) of this section shall be allowed to make a one (1) time voluntary payment to pay off or reduce the negative reserve assumed from the predecessor. This payment shall be made within sixty (60) days of receipt of the first notice of a negative predecessor reserve account. This one (1) time voluntary payment cannot exceed the amount of negative reserve assumed by the successor.
- (4) The liability for delinquent contributions and interest imposed upon the successor by subsection (3) of this section shall be secondary to the liability of the predecessor or predecessors, and if the delinquency has been reduced to judgment, the order of execution on the judgment shall be as follows:
  - (a) Against the assets, both real and personal, of the predecessor or predecessors;
  - (b) Against the assets, both real and personal, of the business acquired; and
  - (c) Against the assets, both real and personal, of the successor or acquirer.
- (5)
  - (a) Notwithstanding the provisions of subsection (3) of this section, any successor to a portion of the trade or business of a subject employer, who is, or by reason of the transfer becomes, a subject employer, shall assume the resources and liabilities of the predecessor's reserve account in proportion to the percentage of the payroll or employees assignable to the transferred portion. In calculating the transferred portion, the secretary shall utilize the last four (4) calendar quarters preceding the date of transfer for workers employed by the successor subsequent to that date. The taxable payroll, benefit charges and the potential benefit charges shall be assumed by the successors in a like proportion.
  - (b) Notwithstanding the provisions of paragraph (a) of this subsection, if any employing unit succeeds to a portion of the trade or business of another employing unit; becomes, by reason of that succession, a subject employer with substantially the same ownership, management, or control as the predecessor employing unit; and lays off or terminates more than one-half (1/2) of the original employees transferred within six (6) months of the date of transfer; then the succession and creation of the new employing unit shall be voided, and the benefits attributable to the lay-offs or terminations shall be charged to the reserve account of the original employing unit.
- (6)
  - (a) The contribution rate of a successor in whole or in part, which was a subject employer prior to succession, shall not be affected by the transfer

of the reserve account for the remainder of the rate year in which succession occurred; except that the rate of the successor shall be recalculated and made effective upon the first day of the calendar quarter immediately following the date of the transfer if there is substantially common ownership, management, or control of the predecessor and successor.

- (b) The contribution rate of a successor in whole or in part, which was not a subject employer prior to succession, shall be determined by a review of the application required by subsection (2)(b) of this section, except if the secretary finds, after a thorough investigation based on the use of objective factors, including but not limited to:

1. The cost of acquiring the business;
2. How long the original business enterprise was continued; and
3. Whether a substantial number of new employees were hired for performance of duties unrelated to the business activity prior to acquisition;

that the succession was solely for the purpose of obtaining a rate lower than that prescribed in KRS 341.270(1) and 341.272 for a new employing unit, then the unemployment experience of the predecessor shall not be transferred, the rate for a new employing unit shall be assigned, and the employing unit shall be otherwise deemed a successor for the purpose of KRS 341.070(7) and subsection (3) of this section.

- (c) The contribution rate for a successor which becomes a subject employer through the simultaneous transfer, either in whole or in part, of two (2) or more predecessor reserve accounts shall be the rate determined in accordance with the provisions of KRS 341.270, by combining the reserve accounts succeeded to as of the computation date for determining rates for the calendar year in which succession occurred.
  - (d) The contribution rate of a successor which succeeds, either in whole or in part, to a predecessor's reserve account after a computation date, but prior to the beginning of the calendar year immediately following that computation date, shall be the rate determined in accordance with KRS 341.270, by effecting the transfer of the reserve account as of the computation date immediately preceding the date of succession.
- (7) Notwithstanding KRS 341.270, the contribution rate for an employing unit that knowingly violates or attempts to violate the provisions of this section or any other provision of the chapter related to determining the assignment of a contribution rate shall be the highest rate assignable under this chapter for the calendar year during which the violation or attempted violation occurred and the three (3) calendar years immediately following that year. If that employer's rate is already at the highest assignable rate, or if the amount of increase in the employer's rate would be less than an additional two percent (2%) for that year, then a penalty rate of contributions of an additional two percent (2%) of taxable wages shall be imposed for each year.
  - (8) In addition to the penalties prescribed in subsection (7) of this section and KRS 341.990(9), any person who knowingly violates this section shall be subject to the penalties stipulated under KRS 341.990.

- (9) (a) The secretary shall establish procedures to identify the transfer of a business for purposes of this section.
- (b) The secretary shall have the authority and discretion to set a contribution rate upon the providing of justification by a subject employer and consideration of relevant factors, including but not limited to the factors set forth in subsections (2) and (6)(a) of this section.

**Effective:** June 29, 2017

**History:** Amended 2017 Ky. Acts ch. 133, sec. 3, effective June 29, 2017. -- Amended 2005 Ky. Acts ch. 12, sec. 1, effective June 20, 2005. -- Amended 2000 Ky. Acts ch. 32, sec. 1, effective July 14, 2000. -- Amended 1998 Ky. Acts ch. 167, sec. 10, effective July 15, 1998. -- Amended 1988 Ky. Acts ch. 106, sec. 11, effective July 15, 1988. -- Amended 1978 Ky. Acts ch. 389, sec. 30, effective July 1, 1978. -- Amended 1974 Ky. Acts ch. 74, Art. VI, sec. 107(23), (31). -- Amended 1972 Ky. Acts ch. 21, sec. 32. -- Amended 1964 Ky. Acts ch. 168, sec. 5. -- Amended 1952 Ky. Acts ch. 154, sec. 17. -- Amended 1950 Ky. Acts ch. 206, sec. 1. -- Amended 1942 Ky. Acts ch. 19, secs. 7 and 16. -- Recodified 1942 Ky. Acts ch. 208, sec. 1, effective October 1, 1942, from Ky. Stat. sec. 4748g-15.